Supreme Court of the United States

OCTOBER TERM, 1969

No. 1250

ISIAH RELFORD,

Petitioner,

—v.—

COMMANDANT, U. S. DISCIPLINARY BARRACKS, FT. LEAVENWORTH, KANSAS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

INDEX

	Page
Docket Entries	1
Excerpts of the transcript of the trial—Court Martial, December 18 & 19, 1961	3
Testimony of Rosemary Futyma	3
Testimony of Mrs. Vivian Jackson	5
Testimony of William T. Maguire	13
Verdict	17
Sentence	17

Page

Exhibits to Respondent's Return to Rule to Show Cause and Answer to Petition for Writ of Habeas Corpus

B—General Court-Martial Order No. 17 18

C—Decision of Board of Review, dated June 11, 1963 .. 21

G—Order denying petition for review, dated September 24, 1963 27

Record from the United States District Court for the District of Kansas

Memorandum and order, October 27, 1967 28

Memorandum and order, June 19, 1968 30

Judgment, June 20, 1968 33

Notice of appeal, filed July 12, 1968 34

Proceedings in the United States Court of Appeals for the Tenth Circuit 35

Opinion, Breitenstein, J., filed April 23, 1969 35

Judgment 38

Order granting motion for leave to proceed in forma pauperis and granting petition for writ of certiorari 39

Docket Entries

(1) January 26, 1962—General Court Martial Order Number 17 entered approving findings of guilty and sentence and forwarding the record of trial for review by a board of Review.

(2) June 11, 1963—Decision of Board of Review, United States Army, approving the findings of guilty but modifying the sentence.

(3) August 12, 1963—Petition for grant of review filed in United States Court of Military Appeals.

(4) September 24, 1963—Order of United States Court of Military Appeals entered denying petition for review.

(5) October 11, 1963—General Court Martial Order Number 727 entered ordering execution of sentence.

(6) October 25, 1967—Petition for writ of habeas corpus with poverty affidavit lodged copy to U. S. Attorney.

October 30, 1967—Memorandum and order granting leave to proceed in forma pauperis, directing clerk to file petition, directing issuance of rule to show cause returnable in 20 days, 10 days to file traverse, filed and entered Stanley-CJ copy to petitioner copy to U. S. Attorney.

October 30, 1967—Petition filed pursuant to above order.

June 20, 1967—Memorandum and Order, finding 1. The general court-martial which tried and convicted the petitioner, was properly constituted, had jurisdiction over the person of the petitioner and the offenses of which he was convicted; 2. The sentence . . . was within legal limits and within the power of the court-martial to adjudge; 3. The petitioner's claim of ineffective assistance of counsel was raised and fully and fairly considered within the military courts system; 4. Petitioner was not denied effective assistance of counsel; 5. Petitioner is not

illegally detained by respondent, and is not entitled to his liberty; dismissing action, filed and entered Stanley-CJ Copies to petitioner, U. S. Attorney and JAGC officials of record.

June 20, 1967—Judgment on decision by the court filed Clerk cc to petitioner, U. S. Attorney and JAGC counsel of record JS 6 card made.

July 12, 1967—Notice of appeal filed copies to U. S. Attorney Benjamin E. Franklin; Lt. Col. Robinson and Capt. Locke copy to Clerk, U. S. Court of Appeals w/cert. copy of docket sheet.

(7) April 23, 1969—Opinion of United States Court of Appeals for the Tenth Circuit affirming judgment and order of the United States District Court for the District of Kansas.

(8) April 23, 1969—Judgment of United States Court of Appeals for the Tenth Circuit in accordance with its opinion filed.

(9) July 22, 1969—Motion for Leave to Proceed in Forma Pauperis and Petition for a Writ of Certiorari filed.

(10) February 27, 1970—Motion for Leave to Proceed in Forma Pauperis and Petition for a Writ of Certiorari granted.

[fol. 2]

TRANSCRIPT OF TRIAL—December 18 and 19, 1961

General Court-Martial

PRESIDENT: The court will come to order.

TRIAL COUNSEL: This court is convened by Court-Martial Appointing Order Number 23, Headquarters United States Army Training Center, Infantry, Fort Dix, New Jersey, dated 14 December 1961, as amended by Court-Martial Appointing Order Number 24, Headquarters United States Army Training Center, Infantry, Fort Dix, New Jersey, dated 18 December 1961, copies of which have been furnished to the law officer, each member of the court, counsel, the accused, and to the reporter for insertion at this point in the record.

* * * *

TRIAL COUNSEL: The prosecution is ready to proceed with the trial in the case of the United States against Isiah Relford, Corporal E-4, United States Army, Faculty Company, US Army Training Center, Infantry, Fort Dix, New Jersey, who is present in court.

* * * *

[fol. 32] TRIAL COUNSEL: I call as my next witness, Rosemary Futyma.

(Rosemary Futyma, a witness for the prosecution, was sworn and testified as follows:)

DIRECT EXAMINATION

Questions by Trial Counsel:

* * * *

[fol. 33] Q. Do you remember Labor Day of this year?
A. Yes, I do.
Q. Was it the 4th of September?
A. Yes.
Q. Where were you?
A. I was here in Fort Dix with my brother.
Q. What time did you get here?
A. A little after ten.

Q. Where had you come from?
A. Linden.
Q. Linden what?—New Jersey?
A. Yes.
Q. How far is that from here?
A. About sixty miles.
Q. Why did you come here?
A. My brother's wife had just had a baby and he came to see her.

* * * *

[fol. 34] Q. Why did you come here with your brother to see the baby?
A. Yes, he wanted to—
Q. To keep him company?
A. Yes, to keep him company.
Q. When you got to Fort Dix, where did you go?
A. I stayed in the car to listen to the radio.
Q. Where was the car parked?
A. In the hospital parking lot.
Q. Underneath a light or in the dark?
A. Yes, in the light.
Q. Were you by yourself?
A. Yes.
Q. Was the top down?
A. Yes.
Q. Rosemary, will you tell the court what happened that night?
A. I was sitting in the car listening to the radio and this man came up on the passenger side and he had a knife. He asked me if the keys were in the car and I said "No" and he said, I think he said, "They have to be because the radio is on." He told me to move over and start the car and drive him down the road. I told him I don't know how. He told me, "You better learn." I tried to start the car and I couldn't and he told me to get out of the car and walk down the road with him and he told me to keep quiet or I get the knife. I got out of the car. I was going to leave my pocketbook so my brother would know that something had happened, but the man told me to take it with me. I got out of the car and he put his left arm around my neck and we walked across the parking lot, the street behind the white cot-

[fol. 35] tages and into the field near the trees. He wasn't saying anything; we just kept walking. We got to this wooded section and he pushed me to the ground and told me to take my shorts off. I said no and he started choking me. He tried to find the zipper of my shorts and he couldn't. He told me to take them off. I got the shorts down to my hip and he took them the rest of the way off, and then he attacked me.

Q. Rosemary, would you complete your story. Did he take your shorts off?

A. Yes.

Q. Did he take your panties off?

A. Yes.

Q. And then what happened?

A. He attacked me.

Q. Did he penetrate you?

A. Yes.

Q. Forcibly?

A. Yes.

Q. Did he kiss you?

A. Yes.

Q. Did he put his tongue between your teeth?

A. Yes.

* * * *

[fol. 41] Q. In what state of dress was the accused at this time?

A. Black pants, dark shirt and what I thought to be a straw-colored hat.

* * * *

[fol. 59] The prosecution calls as its next witness, Mrs. Vivian Jackson.

(Mrs. Vivian Jackson, a witness for the prosecution, was sworn and testified as follows:)

DIRECT EXAMINATION

Questions by Trial Counsel:

Q. Mrs. Jackson, I would appreciate it if you speak loud enough for the members of the court furtherest from

you can hear. Would you state your full name, occupation and residence.

A. My name is Vivian Jackson and I live at—I will start all over again.

Q. Will you state your full name, occupation and residence.

A. My name is Vivian Jackson. I'm a housewife and a parttime waitress. I live at McGuire Air Force Base, Building 4043-F, Falcon Courts, and I'm from Georgia.

• • • •

[fol. 60] Q. Do you live at McGuire, you say?

A. Yes, sir.

Q. Is your husband a military man?

A. Yes, sir.

Q. In what branch?

A. The Air Force.

Q. Do you have any children?

A. I have five children, four boys and a girl.

Q. And you said you were a parttime waitress; is that correct?

A. Yes, sir.

Q. Will you tell the court where you do your part-time work?

A. At the Patio Drive-In at McGuire; it's run through the Exchange, McGuire Exchange.

Q. PX concessionaire?

A. Yes, sir.

• • • •

[fol. 61] Q. What time did you go to work that day?

A. Five o'clock.

Q. And your normal duty hours would have been up to what time?

A. To twelve or a few minutes after twelve, usually.

Q. Were you there throughout the entire seven hours?

A. No, sir, no, sir.

Q. Did you leave?

A. Yes, sir.

Q. At what time?

A. Well, it was approximately 9:05 or 9:10.

Q. Why did you leave, Mrs. Jackson?

A. I had taken my two oldest boys with me to work to go to the movie. The movie is right beside the Patio and I told my husband that I would be back and bring them home when I got my break—we usually get a break after the movie rush. So the children came out of the movie and came in and had dinner—not dinner, just a snack or something—and the movie rush was over about 9 o'clock, but I made some sandwiches to take home with me because I was going to eat too. So then the boss of that night, Danny Kopla, he just fills in more or less—I had asked him if I could take the children home and he said yes. He told me to be back in 20 minutes, and I kept standing there making up sandwiches, and he said, "Why don't you get going right now?" and I left through the back door with my children and took them home.

When I got home I got out of the car, went in the house and my husband was lying on the couch watching TV. I asked him if he wanted a sandwich. He said "Not now, maybe later." So I told him I have got to go back to work in a few minutes, I only have twenty minutes. He said, "All right, be sure to watch the clock," so I was fooling around with the children and he said, "Well, you [fol. 62] better go Vivian; it's about time for you to go back." It was approximately twenty or twenty-five after nine, around there, and I said, "O.K." I said I will have to hurry now because Danny would be expecting me right back.

Q. Danny was whom?

A. Danny Kopla, he was the manager that night. We have a regular manager but he has to have a night off, so Danny does it.

Q. I see.

A. So I went and got into the car and I still had my earrings and sweater—it was raining and I was in such a rush I didn't take time to put my sweater or anything on, just threw it over my shoulder and cranked the car up and backed out and pulled around to Andrews Lane and pulled out, and that way I turned to the left there and went down to West Castle Street and I turned left there and I started coming to the stop sign on South Bolling Boulevard that goes into McGuire.

Q. This is an intersection?
A. Yes, it is an intersection.
Q. Is that a full stop sign?
A. Yes, sir, there is a full stop sign there.
Q. This is the intersection of what?
A. Of West Castle and South Bolling Boulevard.

TRIAL COUNSEL: I would like the court to take judicial notice that there is such an intersection at McGuire Air Force Base. Any objection by the defense counsel to this judicial notice?

DEFENSE COUNSEL: The defense has no objection.

Q. Would you continue, please.

LAW OFFICER: Just a moment, please. There being no objection, the court will take judicial notice of that fact. Please proceed.

TRIAL COUNSEL: Thank you.

[fol. 63] Q. Mrs. Jackson, would you continue, please.

A. Even before I got to that sign I did see someone standing there. I didn't think anything about it. When you are driving along you see people standing along the road—the shuttle bus runs along there, although on Saturday they don't, but I never thought about it being Saturday. I was just determined to get back to work. When I got to the stop sign I didn't actually stop, I just hesitated and started to step down on the gas, and the next thing I knew there was someone trying to get in the door on my right, on the passenger side. So I was trying to open my door and I was screaming and over on the wrong side of the road, which would be the left, and I was going to run into the embankment, and I was screaming at him. I didn't know what in the world to do, I was so terrified that this man was trying to get in the car. So I was pretty sure the railroad tracks were near by, I'm pretty sure when the car was fully stopped I was at the railroad, right near it. He was coming across the seat and was holding me—I don't really know exactly—I was screaming at him and he put his arm, grabbed his arm around my neck and put the knife at my throat. He said, "Be quiet and I won't hurt you." I was just screaming everything at him. All of a sudden I said, "I will be quiet; I will be calm. What do you

want?" He said, "You just be quiet and I won't hurt you." I said, "Yes, sir," and so he told me, "I want you to just drive on down this road here." I said, "Yes, sir." And I said, "You must have a family here or something, why can't I just get out of the car, I will give you the car, I will just get out and go home. I have five little children at home." He said, "I thought you were supposed to be back at your job?" I had already told him I had to be at work some time there. He said, "I thought you were supposed to be back at work?" I said, "I am, but I will go home and take care of the children; my husband would be worried to death; he will have me reported missing; the Air Police will be looking for me [fol. 64] because I have to be back." He was quiet; I talked to him.

* * * *

[fol. 67] A. And then I pulled back out in the road and I backed up and I pulled up and I kept doing the wrong things. We finally got to where he wanted me to turn up—"There's where I want to go, straight up into this dirt road," and he says, "Slow down a little here." I was thinking all the time, "Oh, gee, what was he going to do? If I could just talk to him some more." He told me to turn to the right here and when we got to some telephone poles, I turned up into the right and he told me where to park and I parked.

Q. Did you go from the place he first jumped into the car to that place you just mentioned of your own consent?

A. No, sir.

Q. By force?

A. Yes, sir.

Q. Out of fear?

A. Yes, sir.

Q. Would you tell the court what happened at that point?

[fol. 68] A. Well, at this point I was told to stop and turn the lights off, which I did, and I started begging with him and telling him that he shouldn't do this and everything.

Q. Did you know what he was going to do?

A. Well, it was obvious that he was up to something —I don't—I was praying that I didn't really know because I had the idea—I was just praying that it was right the opposite, but he started fiddling around with his clothes and then he told me to take my pants off. I told him no, I couldn't, I was too nervous,—"Let me roll the window down and get some fresh air." I was afraid I would pass out. So he was unfastening his clothes. I wasn't looking at him because I thought if I don't look at him maybe he wouldn't kill me or something. And then he had gotten his clothes undone and everything, I presume—

Q. How far? Down to what extent?

A. I think that he had already gotten them down to his feet. I really wasn't looking but I saw something white—I figured it was his underwear—out of the corner of my eye. And he told me again to take my clothes off, my pants off—he didn't say "clothes". I told him that I couldn't, that I was too nervous and everything. So then he just kept—all this time he kept his hat and gloves on, never once took those things off, and so then he started getting real close to me and he was easing off my pants and getting me down to the seat and he had my head down back of where your—

Q. Arm rest?

A. —where you put your elbow on the thing, and my pants were laying on the floor. He had got, he was easing my dress up some way with his hand.

Q. Where was the knife?

A. Sir?

[fol. 69] Q. Where was the knife?

A. At my throat. So then he put his body against mine, he was down low on me, and he said, "Do what I have always been told redheads do," and I just lay there. I just turned my head away from him and just let him go ahead and do whatever he was doing. And after he finished the act, I tried to convince him that I would never turn him in. I told him I wouldn't turn him in because there would be so much publicity—I have five little children—and so he raised up and he was sitting up and he was getting his clothes on some way or

other, and I reached down and got my panties—I was trying to think of all kinds of evidence if I was found murdered—who wouldn't if you had a knife to your neck? So he says, "Well, you go ahead and start the car up." So I started the car up, I was sitting there and he said, "By the way, I don't know your tag number; what is your tag number?" I said "I don't know, you have to get out and see," and he said, "That is all right, I do know that you have five children and you work at the Patio. If you ever turn me in, I will find you, all of you." I said, "I won't turn you in, I won't turn you in." I was trying to convince him I wouldn't turn him in. I then started the car and he told me to turn around, just go around in that parking area there and I started driving out the same little road that I came up, and he told me to turn to the left. I turned to the left and I crossed the little bridge and there was a lot of lights on the hill there. I said, "Where am I; I'm lost?" and he said, "Oh, you're all right," like that, and then a little later I heard guns shooting or something and I said, "What's that?" He said, "That's some firing range," or something. So then we drove on a little bit more and I heard this whinning sound and I said, "What's that?" He says, "A plane probably," or something like that. So I started talking to him. I told him he shouldn't do things like [fol. 70] this to people; he shouldn't do anything like that—some woman might get a heart attack and wreck the car and kill him and everything else. He didn't say anything to that. So as we rode along, I started thinking of maybe now he is taking me somewhere else, maybe he didn't like where he was at. I started trying to cope with him some other way—maybe tell him a joke, something funny. I managed something about the people where I work. He laughed; it wasn't really that funny to me, but he laughed. By that time I saw the NCO Club.

Q. The NCO Club where?

A. On Fort Dix, here.

Q. Fort Dix?

A. Yes, sir. So I knew for sure where I was. I saw a sign up that said "Regiment" something, so I drove down this road and he told me that he wanted—as I

kept driving along I was talking to the man and as we come to a fence, he told me, "I want you to turn right here." So I pulled into it right there.

Q. Where was "there"? You pulled onto the grass?

A. No, sir, it was by a fence. There is a pavement there and there is a parking area.

Q. A parking lot?

A. Yes, sir. If you come down to the fence, you pull into a parking area. He told me to pull alongside this car, this green and white car—I don't know the make. And I saw the MPs over there about three or four cars down—there wasn't that many cars, but that's how many car lengths it would be—and all of a sudden he noticed them and he said, "Drive on across here." I said, "I can't drive across there now." He said, "You don't say anything, just drive on."

Q. Did the MP car follow you?

[fol. 71] A. I never did know. I never did know because the mirror was flipped backwards and I was only trying to think some way to get him caught. That was all that was going through my mind—if I could get out of the car and how was I going to get him caught. So I was driving along a road that had trees along it and it was, the road was real wet, and he said—I kept talking to him and talking to him—and he said, "Pull over, I want to show you how to get back to McGuire." So I pulled over there and there was a sign right up ahead of me "Yield the right of way," and it just so happened that I was in a no parking zone, which I had probably seen but really didn't dawn on me. So I pulled over there and he sit there a minute and started to open the door.

Q. You stopped or—

A. Yes, sir, I had stopped the car.

Q. Where was this place?

A. It was near the CID building. I could show you if I had to drive it; if I could drive it I could take you there; it's near here somewhere. * * *

* * * *

[fol. 79] EXAMINATION BY THE COURT

Questions by the President:

* * * *

[fol. 81] A. * * * I know he had his hat on.

Q. What kind of hat was it?

A. It was—you see them quite often now—just a—I forget the name of the thing, one of the modern type.

Q. Cap or fedora?

A. Not a hat you would pull down.

Q. Brimmed hat?

A. Yes, sir.

Q. Cloth? Made of cloth, do you know?

A. More like a felt or something; I don't know.

* * * *

[fol. 110] TRIAL COUNSEL: I call as my next witness, Mr. Maguire.

(Warrant Officer, William T. Maguire, a witness for the prosecution, was sworn and testified as follows:)

DIRECT EXAMINATION

Questions by Trial Counsel:

* * * *

[fol. 113] Q. Verbally, could you tell this court, Mr. Maguire, what he told you in regards to the offenses of which he was suspected?

A. When I questioned him, Relford told me on the night of 21 October at about nine o'clock at night he had been drinking in a bar in Wrightstown, New Jersey, sir. He was there drinking beer; he wasn't drunk but was feeling good—as he said "high". He stated that he felt he wanted to have intercourse with a woman. He told me that it wasn't especially particular to him whether it was a colored woman or a white woman. He said he felt that he wanted to have intercourse with a woman and didn't care whether he had to rape one to get it or not. Relford stated that he then drove his 1958 Oldsmobile down from Wrightstown to the housing area across the Cookstown Road from McGuire Air Force Base to

the Capehart area. He stated he drove the car half way through the housing area and parked the vehicle behind one of the blocks of dependent quarters where the officers and NCOs at McGuire Air Force Base are quartered. [fol. 114] After parking his automobile Relford stated that he walked back to an intersection. He said he didn't know the actual name of the streets, forming the intersection, but on one corner of the intersection there were some trees an a stop sign. He said there was no sidewalk on that corner but the stop sign came down almost to the curb. He stated he didn't think it was raining but it might have been drizzling. Relford said he stood at the stop sign there and waited. He said eventually there was a 1959 Chevrolet, along with a woman in it. Relford said this woman stopped for the stop sign, he walked over, opened the door on the passenger side of the front seat. Relford said he got into the vehicle, put his left arm around the back of the neck of the woman and then held a knife to her throat, the point of the knife at approximately her Adam's Apple. Relford said as he did this the woman attempted to open the door and attempted to get out of the vehicle on the driver's side. Relford said he reached over and closed the door and still held the knife at her throat. Relford said the knife he was holding at her throat was a hunting knife with a bone handle and he had gotten the knife when he was in jungle training school at Panama. Relford said after he got the door closed he held the knife at the woman's throat and told her to do as he told her and he wouldn't hurt her. He told her to drive down the road to the Cookstown Road. When she got to the intersection forming Cookstown Road, Relford said he told her to turn left on the road towards Cookstown. Relford said then, while driving down the Cookstown Road the woman told him that she had five children and begged him not to hurt her. Relford stated that he told the woman that if she did exactly as he said, he would not hurt her. Relford told me that the woman to whom he held the knife to her throat, was a redheaded white woman, was wearing a white dress, the type of dress that is worn by waitresses. When she got to Cookstown, according to

[fol. 115] Relford, he told the woman to turn right, which would take him on the Cookstown-Browns Mills Road. They went, according to Relford, down the Cookstown-Browns Mills Road until they got to a dirt road which led off to the left, the road, which, according to Relford, that goes back to Taylor Mountain. Relford then told her he had already missed the road in the dark and he told her to stop and back up, which she did, and then went into the dirt road. Relford said after going into the dirt road he instructed the woman to turn off to the right and park in one of the training areas. Relford said that he was holding the knife to the woman's throat at this time and when they got into the training area he told her to park and to do exactly as he told her and he wouldn't hurt her. Relford said then after they parked he started taking down his trousers and undershorts and he told the woman to take off her panties. Relford said that she did take off her panties unassisted and again Relford told the woman to do just as he said and he would not hurt her. Relford said after the woman took off her panties and he had his trousers and undershorts down around his knees, he forced the woman down on the front seat. Relford said that he then forced her legs around and got between her legs. He said that he then got between the woman's legs and inserted his penis in her vagina. * * *

* * * *

[fol. 118] Q. Mr. Maguire, will you tell us what conversation took place relative to this second part or second series of offenses?

A. Right, Sir. As I have stated, I used the words "Modus operandi" when I advised Corporal Relford of his rights. I told Corporal Relford "modus operandi" meant that the actual facts and circumstances, everything that had happened, was similar to the crime which had been committed on the 21st, and that I was going to question him on that kidnapping and rape. Corporal Relford admitted that he had committed that rape. Corporal Relford told me that at about 9:15 or 9:30, 2115 or 2130 hours on Labor Day, he had felt that he needed

a woman and he had been drinking. He subsequently went to Walson Army Hospital to find a woman. Corporal Relford stated that he had parked his car in the visitors parking lot at Walson Army Hospital and then walked over to the front of the hospital, which was the staff parking lot. He said that when he got to the front of the hospital in the parking lot there he saw a young girl that he thought to be about sixteen or seventeen years of age sitting in an automobile. Relford stated that he walked up to the passenger side of the front [fol. 119] seat, opened the door of the automobile and climbed into the front seat. Relford stated that he had put his left arm along the shoulders of the girl and around her neck and with the right hand put a skinning knife to her throat. Relford said it was not the same knife he used on the 21st of October, but a different knife that he had since lost and did not know where it was. Relford said while holding the knife to her throat, he told her to drive out of the parking lot and down the road. Relford said the girl told him she could not drive, did not know how to drive the automobile and could not drive. Relford said, still holding the knife to the girl's throat, he told her to get out of the vehicle and that he and the girl got out of the vehicle on the passenger side of the vehicle. Relford said he told the girl to do as he told her and he wouldn't hurt her. Relford then said he walked across the parking lot and across the street by a traffic light and walked behind the white buildings. Relford said while walking out of the parking lot and walking down the street, he had his left arm around the back of the neck of the young girl and held his head against hers to make it look like they were lovers out for a walk. As they walked across the parking lot he held the knife down by his right side trying to conceal it. Relford said he walked past these white buildings, across the field until they came to a wooded area. As he came to the wooded area he again put the knife to the girl's throat and instructed her to take off her shorts. Previous to this, he said the girl had been dressed in a blouse and shorts. He said he forced the girl down on the ground. Relford said as the girl and he were half

sitting, half lying on the ground, he removed the girl's shorts and panties. He said the girl begged him, was crying, begged him not to hurt her. Relford stated he [fol. 120] told her that if she did exactly as he said, he would not hurt her. Relford then said after he got the girl's panties and shorts off, he forced her legs apart and got between her legs. Relford said the girl was still crying and begged him not to hurt her. Corporal Relford said he told her again if she did exactly what he told her he would not hurt her. Relford then said he inserted his penis into the girl and stayed on her, having intercourse, for about four minutes. He said that, as he put it, * * *

* * * *

[fol. 150] VERDICT

PRESIDENT: Corporal Relford, it is my duty as president of this court to inform you that the court in closed session and upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring in each finding of guilty, finds you:

Of all Specifications and Charges: GUILTY.

* * * *

[fol. 185] SENTENCE

PRESIDENT: Corporal Isiah Relford, it is my duty as president of this court to inform you that the court in closed session and upon secret written ballot, all of the members present at the time the vote was taken concurring, sentences you: To be reduced to the lowest enlisted grade, to forfeit all pay and allowances, and to be put to death.

* * * *

EXHIBIT B

HEADQUARTERS
ARMY TRAINING CENTER, INFANTRY
Fort Dix, New Jersey

407213

GENERAL COURT-MARTIAL ORDER
NUMBER 17

26 January 1962

Before a general court-martial which convened at Fort Dix, New Jersey, pursuant to Court-Martial Appointing Order Number 23, Headquarters US Army Training Center, Infantry, Fort Dix, New Jersey, 14 December 1961, as amended by Court-Martial Appointing Order Number 24, same headquarters, 18 December 1961, was arraigned and tried:

Corporal (E-4) Isiah Relford, RA 14 479 005, US Army, Faculty Company, US Army Training Center, Infantry, Fort Dix, New Jersey.

Charge I: Violation of the Uniform Code of Military Justice, Article 120.

Specification 1: In that Corporal (E-4) Isiah Relford, United States Army, Faculty Company, United States Army Training Center, Infantry, Fort Dix, New Jersey, did, at Fort Dix, New Jersey, on or about 4 September 1961, rape, Rosemary R. Futyma.

Specification 2: In that Corporal (E-4) Isiah Relford, United States Army, Faculty Company, United States Army Training Center, Infantry, Fort Dix, New Jersey, did, at Fort Dix, New Jersey, on or about 21 October 1961, rape, Vivian G. Jackson.

Charge II: Violation of the Uniform Code of Military Justice, Article 134.

Specification 1: In that Corporal (E-4) Isiah Relford, United States Army, Faculty Company, United States Army Training Center, Infantry, Fort Dix, New Jersey, did, on or about 4 September 1961, at Fort Dix, New Jersey, in the Hospital Staff Parking Area, adjacent to

the Walson Army Hospital, kidnap and forcibly take away, Rosemary R. Futyma, a female child of about fourteen years of age and take her to a wooded area near the Grove Park Family Housing Area, a place on the Fort Dix Military Reservation and within the State of New Jersey.

Specification 2: In that Corporal (E-4) Isiah Relford, United States Army, Faculty Company, United States Army Training Center, Infantry, Fort Dix, New Jersey, did, on or about 21 October 1961, near the intersection of West Castle Street and South Bolling Boulevard, McGuire Air Force Base, New Jersey, kidnap and forcibly take away, Vivian G. Jackson, a female, and carry her by means of a motor vehicle, to an area near the intersection of the Cookstown-Browns Mills Road and Mount Road, a place on the Fort Dix Military Reservation, and within the State of New Jersey.

PLEAS

To all the Charges and *Specifications*: Not Guilty

FINDINGS

Of all *Specifications* and Charges: Guilty

SENTENCE

To be reduced to the lowest enlisted grade, to forfeit all pay and allowances, and to be put to death. (One previous conviction considered.)

The sentence was adjudged on 19 December 1961.

ACTION

HEADQUARTERS
US ARMY TRAINING CENTER, INFANTRY
Fort Dix, New Jersey

26 January 1962

In the foregoing case of Corporal (E-4) Isiah Relford, RA 14 479 005, US Army, Faculty Company, US Army

Training Center, Infantry, Fort Dix, New Jersey, the sentence is approved. The forfeitures shall apply to pay and allowances becoming due on and after date of this action. The record of trial is forwarded to The Judge Advocate General of the Army for review by a board of review. Pending completion of appellate review the accused will be confined in the United States Disciplinary Barracks, Fort Leavenworth, Kansas.

/s/ R. H. TUCKER
/t/ R. H. TUCKER
Maj Gen, USA
Commanding

BY COMMAND OF MAJOR GENERAL TUCKER:

OFFICIAL:

R. L. KOLB
Colonel, General Staff
Act Chief of Staff

/s/ Carolyn M. Anthony
CAROLYN M. ANTHONY
Major, WAC
Act Asst AG

DISTRIBUTION: (DL 1-71)
13 (45)

OFFICE OF THE JUDGE ADVOCATE GENERAL OF THE ARMY
TO THE ADJUTANT GENERAL

This order accurately rejects the results of trial and action of the convening authority in this case

FOR THE JUDGE ADVOCATE GENERAL

Copy sent
Correction Division, OPMG

EXHIBIT C

HEADQUARTERS
DEPARTMENT OF THE ARMY
Office of The Judge Advocate General
Washington 25, D. C.

In the Board of Review, United States Army
Before BARON, ROBBLEE and BRACK, Members

CM 407213

UNITED STATES

v.

Corporal (E-4) ISIAH RELFORD, RA 14 479 005, US Army, Faculty Company, US Army Training Center, Infantry, Fort Dix, New Jersey

11 June 1963

HEADQUARTERS
U. S. ARMY TRAINING CENTER, INFANTRY

Sentence adjudged 19 December 1961
Approved sentence: Reduction to the lowest enlisted grade, total forfeitures and to be put to death.

Appellate Counsel for the Accused:

Captain GARY G. KELTNER, JAGC
Captain RICHARD A. BAENEN, JAGC
Captain DAVID M. GILL, JAGC
Lt. Col. RALPH HERROD, JAGC

Appellate Counsel for the United States:

Captain JOSEPH M. LIVERMORE, JAGC

DECISION

EDWIN W. BARON, Judge Advocate.

The accused was tried by general courts-martial for kidnapping and raping two females in violation of Arti-

cles 134 and 120, Uniform Code of Military Justice, respectively. He pleaded not guilty to all specifications and charges. The court returned findings of guilty and sentenced him to be reduced to the lowest enlisted grade, total forfeitures, and death. The convening authority approved the sentence.

The evidence surrounding these offenses are as follows:

On 4 September 1961 at about 2200 hours Miss F, 14 years of age, was sitting in her brother's automobile in the parking area adjacent to the Walson Army Hospital, Fort Dix, New Jersey. She had accompanied her brother who had gone into the hospital to visit his wife and newly born child. A negro man approached the passenger side of the car, wielded a knife and told Miss F. to move over and start the car. When she told him she didn't know how to drive he ordered her out of the car. He menaced Miss F. with the knife and led her across the parking lot into a field. There he had sexual intercourse with her by force and without her consent. He wore a hat and gloves during the entire incident. When he had accomplished his purpose he departed. Miss F. ran across the field to a lighted house where she complained that she had been raped. The occupant of the house testified that she was distraught and hysterical. Her clothes were disheveled and grass stained. The military police were called and they took her to the hospital.

On 21 October 1961, Mrs. J., married and the mother of 5 children, a part-time waitress at a drive-in at McGuire Air Force Base, left her employment shortly after 2100 hours during a 20-minute work break to take her two children home from the Post Theater. After delivering them she proceeded to return to work. Enroute, as she slowed down for a stop sign, the accused opened the car door and slid into the car on the passenger side. He placed a knife at her throat and directed her where to drive and park the car. Continuing to hold the knife at her throat, he had sexual intercourse with her. After the act was completed the accused again directed her to drive and then to stop. Military Police approached the car and asked to get out of the car, as she complied she told

the Military Police that the accused had raped her. The accused was immediately apprehended on the passenger side of the vehicle. She informed the Military Police that he had a knife which they found hidden under the front seat of the car. Her assailant wore a hat and gloves.

Relford was taken to the CID office where he was advised of his rights and informed that he was suspected of kidnapping and rape. He admitted consensual intercourse with Mrs. J. The next morning Relford was reinterrogated after again being advised of his rights. He orally confessed to raping and kidnapping both Miss F. and Mrs. J. A typed confession was then prepared and after again being advised of his rights he signed the written confession.

About 10 minutes later a line-up was conducted. A group of 6 other negroes of Relford's size and dressed in the same uniform were lined up. Miss F. and Mrs. J. were brought into the room and each member of the line-up read a prepared statement. After the last man had read the statement, each woman was escorted from the line-up and outside of the presence of each other independently identified the accused as her assailant.

The accused was examined by a psychiatrist who testified at the trial that Relford was sane.

Appellate defense counsel has filed a lengthy brief with this Board setting out 27 assignments of error, 20 of which are alleged to require a rehearing on the findings. The remainder of the assignments deal with sentence and post trial matters.

The only assignment that we consider requires consideration is that the accused "was deprived of his right to counsel possessing a requisite standard of skill" or as it is usually designated—inadequacy of counsel.

The Court of Military Appeals has had several occasions to set forth the standard required of defense counsel:

> "* * * [A]n accused, if he contends his rights have not been fully protected, must reasonably show that the proceedings by which he was convicted were so erroneous as to constitute a ridiculous and empty

> gesture, or were so tainted with negligence or wrongful motives on the part of his counsel as to manifest a complete absence of judicial character. * * *". *United States* v. *Hunter*, 2 USCMA 37, 6 CMR 37.

Counsel for the accused states that trial defense counsel had inadequate experience. He had graduated from law school in May 1960 and from the Judge Advocate General's School in May 1961. He had no civilian trial experience. He had participated in only one other contested trial and had acted as military counsel where the defense was actively handled by a civilian lawyer.

Appellate defense counsel sets out 183 unrelated items setting forth acts and omissions of trial defense counsel which appellate defense counsel believes to be significant to a determination of the adequacy of the trial representation. It is unnecessary to set out in this opinion such suggestions of counsel. We only desire to point out that the fact that defense counsel did not pursue the tactics suggested by appellate defense counsel does not necessarily add up to an inadequate defense and, even if defense counsel had emulated appellate defense counsel's strategy of defense we have no reason to believe that would have made the defense adequate. It is a mistaken notion that the more objections, the more motions, the more cross-examination, the better the defense. It would be a sad day when defense counsel would have to resort to such tactics to protect themselves against a charge of inadequacy of representation.

A defense in a law suit, be it criminal or civil, is predicated upon the theory of defense. This is a definite and coordinated hypothesis that is based upon all the evidence and consistent with the applicable law on the subject and has a reasonable probability of success in convincing a jury that the accused is not guilty of the offense charged or creates in their mind a reasonable doubt of guilt. Appellate defense counsel's suggested tactics do not meet this standard.

In this case the defense counsel was called upon to defend an accused who was charged with raping and

kidnapping two females. The accused had been apprehended in the automobile of his victim immediately upon her complaint of rape to a military policeman. There could be no mistaken identity here. Mrs. J. was the mother of 5 children, she had left work during a work break to drive two of her children home from the post movie and shortly thereafter was raped at the point of a knife on her return to work. Any cross-examination impugning her morals or tending to infer a consensual date could not be expected to win any votes from a court.

Miss F. was fourteen years old. The evidence, amply corroborated, proved that prior to the rape she was a virgin. There was evidence of fresh complaint. She, distraught, disheveled, bleeding and bruised, rang the door bell of a stranger's house near the scene to seek aid. The assaulter in both rapes peculiarly wore a hat and gloves while attacking his victims which leads readily to the inference that both rapes were accomplished by the same individual. The accused, after being advised of his rights confessed to both rapes.

The line-up after the confession confirmed the accused's identity. Any question of accused's insanity had been resolved against him.

This is not a case where defense counsel was negligent or disloyal. He was aware of the strength of the government's case. Trial defense counsel's tactics were calculated and arrived at deliberately and with circumspection, as set forth in his affidavit filed with the record. The defense was a tacit admission that the women had been raped. Defense sought to build up as little "sales resistance" as possible, not to aggravate an already aggravated case with the hope that the court would not adjudge the death penalty. There is no showing that the accused requested counsel to take any of the actions suggested by appellate defense counsel or that he disapproved of the actions taken by trial defense counsel. We cannot say as a matter of fact or law that this was an inadequate defense. The fact that it failed before that particular court begs the question.

It is true that defense counsel was not an experienced counsel. It may also be true that he might have handled

the accused's defense in a far more aggresive manner but we are satisfied under all the circumstances we cannot say his theory was wrong or that the finding would have been different. Justice Minton's comment in *United States* v. *Morgan*, 346 US 516, 98 L. ed. 259, epitomizes the answer to the accused's charges when he said he did not know "how a lawyer might have helped him (the accused Morgan) unless he picked the lock on the jail house door".

Unfortunately for the accused there was little evidence available in extenuation and mitigation. No witnesses were called other than the assistant chief of the Mental Hygiene Consultation Service. In that the accused prior to his apprehension had been ordered to appear before a 208 Board convened to determine if he had such undesirable traits of character to warrant his elimination from the service, we can infer that had the defense placed the accused's character in issue there would have been substantial rebuttal testimony.

We have evaluated the accused and his offenses carefully and conclude that the death penalty is not appropriate in this case.

The accused's petition for a new trial heretofore filed has been considered and is hereby denied.

Therefore, the Board of Review finds the findings of guilty of all charges and specifications correct in law and fact. Reassessing the sentence, the Board of Review finds only so much of the sentence as provides for dishonorable discharge, total forfeitures, confinement at hard labor for thirty (30) years and reduction to the grade of E-1 should be approved. The findings of guilty and the sentence as modified are affirmed.

PAUL A. ROBBLEE, and JOSEPH L. BRACK, Judge Advocates, concur.

/s/ Edwin W. Baron
/s/ Paul A. Robblee
/s/ Joseph L. Brack

EXHIBIT G

UNITED STATES COURT OF MILITARY APPEALS

No. 17,072

UNITED STATES, APPELLEE

v.

Corporal ISIAH RELFORD (RA 14 479 005), APPELLANT

ORDER DENYING PETITION FOR REVIEW

On consideration of the Petition for Grant of Review of the decision of the Board of Review in case No. CM 407213 of the United States Army, it is, by the Court, this 24th day of September, 1963,

ORDERED:

That said Petition be, and the same is, hereby denied.

For the Court

cc: the Judge Advocate General
Col Joseph L. Chalk
Capt Ronald L. Gainer
Capt Gary G. Keltner
Appellate Defense Counsel
Lt Col Francis M. Cooper
Lt Col Bruce C. Babbitt
1st Lt Robert T. Webster
Capt Joel Robinson
Appellate Government Counsel

Copy sent to Research Branch Oct. 4, 1963

D34534

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

No. L-303

ISIAH RELFORD, PETITIONER

vs.

COMMANDANT, U. S. DISCIPLINARY BARRACKS, LEAVENWORTH, KANSAS, RESPONDENT

MEMORANDUM AND ORDER

Petitioner, convicted by an Army general court-martial on two separate charges of kidnaping and rape, received a death sentence later reduced on review to thirty years imprisonment. The United States Court of Military Appeals affirmed. Petitioner is now serving his sentence in custody of respondent, and applies for a writ of habeas corpus and for leave to proceed in forma pauperis.

Petitioner alleges that he was not adequately represented by counsel. The right to assistance of counsel is a fundamental right essential to "military due process," paralleling the same right guaranteed by the Constitution to defendants in civilian courts. *United States* v. *Clay*, 1 U.S.C.M.A. 74. This court has jurisdiction to determine whether petitioner was denied this basic right although inquiry is limited to the question whether the military courts gave full and fair consideration to the constitutional question presented. *Kennedy* v. *Commandant*, 377 F.2d 339 (10th Cir. 1967).

In order that the court may be advised as to whether the question here presented has been fully and fairly considered by the military courts,

IT IS ORDERED that petitioner's motion for leave to proceed in forma pauperis be granted and that the application be filed by the clerk. And

IT IS FURTHER ORDERED that a rule to show cause issue, returnable within twenty days from this date; that within ten days after receipt by him of a copy of respondent's answer and return, petitioner file a traverse thereto, admitting or denying all factual allegations therein contained; and that the file then be returned to the undersigned judge of this court for such other and further proceedings as may be appropriate.

Dated at Kansas City, this 27th day of October, 1967.

/s/ Arthur J. Stanley, Jr.
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

No. L-303

ISIAH RELFORD, PETITIONER

vs.

COMMANDANT, UNITED STATES DISCIPLINARY BARRACKS, FORT LEAVENWORTH, KANSAS, RESPONDENT

MEMORANDUM AND ORDER

Pursuant to the order entered October 30, 1967, a rule to show cause issued. Respondent has filed his answer and return, and petitioner his traverse thereto. The court, having examined the pleadings and exhibits and having read the entire record of trial, finds that no hearing is required to resolve issues of fact, and, from the uncontroverted allegations of the pleadings, makes the following

Findings of Fact:

1. Petitioner, while serving on active duty in the United States Army, was duly convicted on December 19, 1961 at Fort Dix, New Jersey by a general court-martial of the offenses of rape and kidnaping, and was sentenced to be reduced to the lowest enlisted grade, to forfeit all pay and allowances, and to be put to death.

2. During his court-martial, petitioner was represented by two qualified military lawyers, both members of the Judge Advocate General Corps, and both certified in accordance with Article 27(b), United States Code of Military Justice, 10 U.S.C.A. § 827(b).

3. Under the provisions of Article 61, U.C.M.J., 10 U.S.C.A. § 861, the convening authority referred the record of trial to his staff advocate for review. The staff judge advocate found the findings of guilty correct in law and fact, and recommended that the sentence as ad-

judged by the court-martial be approved. The convening authority approved the findings of guilty and the sentence, and forwarded the record of trial to the Judge Advocate of the Army for review by a Board of Review.

4. The Board of Review in the Office of the Judge Advocate General of the Army reviewed the record of trial as required by the provisions of Article 66, U.C.M.J., 10 U.S.C.A. § 866. The petitioner was represented in all proceedings before the Board of Review by a qualified military lawyer designated by the Judge Advocate General under the provisions of Article 70(a) and (c) and (c)(1), U.C.M.J., 10 U.S.C.A. § 870(a) and (c)(1). Petitioner's assigned military counsel appeared and argued the case before the Board of Review. On June 11, 1963, the Board of Review found the findings of guilty correct in law and fact, but further determined that only so much of the sentence as provided for dishonorable discharge, forfeiture of all pay and allowances, confinement at hard labor for thirty years and reduction to the grade of E-1 should be approved. The board affirmed the findings and the sentence as so modified.

5. On August 12, 1963, petitioner filed a petition in the United States Court of Military Appeals for a grant of review pursuant to Article 67, U.C.M.J., 10 U.S.C.A. § 867, assigning as errors most of the matters considered by the Board of Review, including the allegation of ineffective assistance of counsel. On September 24, 1963, the Court of Military Appeals denied the petition for a grant of review. (14 U.S.C.M.A. 687).

6. The sentence, as modified and approved, was ordered into execution by General Court-Martial Order Number 727, Headquarters Fort Leavenworth, Kansas, dated October 11, 1963.

7. The trial tactics pursued by petitioner's counsel during the court-martial were justified by the nature of the offenses charged, the quality of the evidence against petitioner, and the possibility that the death sentence might be imposed. Counsel deliberately elected to pursue a course of conduct designed to avoid the extreme penalty despite overwhelming evidence of guilt.

The court makes the following

Conclusions of Law:

1. The general court-martial which tried and convicted the petitioner was properly constituted, had jurisdiction over the person of the petitioner, and the offenses of which he was convicted.

2. The sentence adjudged by the court-martial was within legal limits and within the power of the court-martial to adjudge.

3. The petitioner's claim of ineffective assistance of counsel was raised and fully and fairly considered within the military courts system.

4. Petitioner was not denied effective assistance of counsel.

5. Petitioner is not illegally detained by respondent, and is not entitled to his liberty.

IT IS, THEREFORE, ORDERED that the action be and it hereby is dismissed.

Dated at Kansas City, this 19th day of June, 1968.

/s/ Arthur J. Stanley, Jr.
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action File No. L-303

ISIAH RELFORD, PETITIONER

vs.

COMMANDANT, U. S. DISCIPLINARY BARRACKS,
FT. LEAVENWORTH, KANSAS, RESPONDENT

JUDGMENT

This action came on before the Court, Honorable Arthur J. Stanley, Jr., Chief, United States District Judge, presiding, and a decision having been duly rendered,

It is Ordered and Adjudged that all relief be denied and the action be and it hereby is dismissed.

Dated at Topeka, Kansas, this 20th day of June, 1968.

CHARLES W. CAHILL
Clerk of Court

By /s/ Elizabeth C. Rion
Deputy

Entered in the docket 6-20-68

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

No. L-303

ISIAH RELFORD, PETITIONER

v.

COMMANDANT, U. S. DISCIPLINARY BARRACKS,
FORT LEAVENWORTH, KANSAS, RESPONDENT

NOTICE OF APPEAL

Notice is hereby given that Isiah Relford, the petitioner above named, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the order dismissing the above entitled action entered on the 20th day of June, 1968 in above case.

/s/ Isiah Relford
Petitioner

IN THE UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 40-68—March Term, 1969

ISIAH RELFORD, PETITIONER-APPELLANT

v.

COMMANDANT, U. S. DISCIPLINARY BARRACKS, FT. LEAVENWORTH, KANSAS, RESPONDENT-APPELLEE

Appeal from the United States District Court for the District of Kansas

(District Court No. L-303)

JUDSON W. DETRICK for Appellant.

RICHARD F. LOCKE, Captain, JAGC, and KENNETH C. CROCKETT, Ass't U. S. Attorney, (BENJAMIN E. FRANKLIN, U. S. Attorney, and ARNOLD I. MELNICK, Lieutenant Colonel, JAGC, were with them on the brief) for Appellee.

Before BREITENSTEIN, SETH and HICKEY, Circuit Judges.

OPINION

BREITENSTEIN, Circuit Judge.

This is an appeal from the denial of a military prisoner's petition for habeas corpus.

Petitioner, while on active duty in the United States Army, was charged with the kidnapping and rape of a woman in September, 1961, and with similar offenses

against another woman in October, 1961. On December 21, 1961, a general court-martial found him guilty of all charges and sentenced him to death. The Board of Review upheld the findings of guilt and reduced the sentence to 30 years. That decision was affirmed by the United States Court of Military Appeals. In response to a show-cause order, the government filed in the district court the voluminous record made before the military tribunals. The district court reviewed that record, made appropriate findings, and denied the habeas petition without a hearing.

The first claim is that in the court-martial proceedings the petitioner did not have the effective assistance of competent counsel. This issue was fully presented to the Board of Review and the Court of Military Appeals and was carefully and fairly considered by those tribunals. They rejected the argument on the grounds that the objections went to trial tactics which must be considered in the light of the overwhelming evidence of guilt and counsel's desire to mitigate the penalty. Our review of the record convinces us that the court-martial was a disciplined contest and not a mockery or a spectacle. See United States v. Augenblick, 393 U.S. 348, 356, and Kienlen v. United States, 10 Cir., 379 F.2d 20, 24. We agree with the trial court that the military judicial system gave full and fair consideration to the constitutional question, and that its decision must stand. See Burns v. Wilson, 346 U.S. 137, 142, and Kennedy v. Commandant, United States Disciplinary Barracks, 10 Cir., 377 F.2d 339, 342.

The remaining points raised by resourceful appellate counsel were not presented to the district court and are not properly before us for review. Johnson v. Patterson, 10 Cir., 367 F.2d 268. In the circumstances of the case and to avoid a repetitive habeas application, we have given consideration to them.

About twelve hours after his arrest, the petitioner confessed to the military authorities. He had been repeatedly warned of his constitutional rights but the record does not show a waiver of counsel. The argument is that the extra-judicial confession was improperly received in evi-

dence in violation of the rules stated in Escobedo v. Illinois, 378 U.S. 478, and Miranda v. Arizona, 384 U.S. 436. In Johnson v. New Jersey, 384 U.S. 719, 734, the Supreme Court held that the Escobedo decision "is available only to persons whose trials began after June 22, 1964," and that the guidelines in Miranda are "available only to persons whose trials had not begun as of June 13, 1966." Here the entire military proceedings were completed before either the Escobedo or Miranda decisions.

The petitioner complains that he was subjected to a line-up at which he was identified by the victims of his crimes in violation of Gilbert v. California, 388 U.S. 263, and United States v. Wade, 388 U.S. 218. Stovall v. Denno, 388 U.S. 293, 300, says that these decisions operate prospectively. The line-up was fairly conducted and adequately protected the petitioner's due process rights.

The procedure followed for the admission and consideration of the confession is said to violate the rules laid down in Jackson v. Denno, 378 U.S. 368, 394. There the Supreme Court said that the voluntariness of a confession must be determined by a body other than the one trying the question of guilt or innocence. At the court-martial the law officer gave the defendant an opportunity, out of the hearing of the members of the board, to present evidence as to voluntariness. The defense put on no evidence and only pointed out the lapse of twelve hours from the arrest to the confession. The law officer then told the court-martial that his ruling was "final only on the question of admissibility" and "does not conclusively establish" voluntariness. This satisfied paragraph 140 of the Manual for Courts-Martial (1951) and the requirements of Jackson v. Denno if that decision is to be given retroactive effect. Heilman v. United States, 7 Cir., 406 F.2d 1011.

Finally, counsel for petitioner argues that the cumulative effect of all the claimed errors denied the petitioner a fair trial consonant with the requirements of due process. We are not persuaded. Consideration of the points one by one or in their totality, produces the same result. The petitioner had a fair trial.

Affirmed.

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

40-68

ISIAH RELFORD, PETITIONER-APPELLANT

vs.

COMMANDANT, U. S. DISCIPLINARY BARRACKS, FT. LEAVENWORTH, KANSAS, RESPONDENT-APPELLEE

Appeal from the United States District Court for the District of Kansas

Before Honorable JEAN S. BREITENSTEIN, Honorable OLIVER SETH and Honorable JOHN J. HICKEY, Circuit Judges.

JUDGMENT—April 23rd, 1969

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Kansas and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court is affirmed.

WILLIAM L. WHITTAKER
Clerk

By /s/ Gladys E. Hobbs
Deputy Clerk

SUPREME COURT OF THE UNITED STATES

No. 665 Misc., October Term, 1969

ISIAH RELFORD, PETITIONER

v.

COMMANDANT, U. S. DISCIPLINARY BARRACKS, FT. LEAVENWORTH, KANSAS

On petition for writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to retroactivity and scope of O'Callahan v. Parker, 395 U.S. 258. The case is transferred to the appellate docket as No. 1250 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

February 27, 1970

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 388042 793